

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 2ND JUNE 2006 / 12TH JYAISHTA, 1928

MFA.No. 871 of 2000(B)

WCC.52/1997 of W.C.C.,KOZHIKODE
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APPELLANT:

V.K.SREEJITH, S/O.LATE KUMARAN,
THOPPAYIL HOUSE, NADAKKAVU,
KOZHIKODE.

BY ADV. SRI.AVM.SALAHUDIN

RESPONDENTS:

THE PROPRIETOR,
LATA auto rickshaw GARAGE, MALAPARAMBA,
KOZHIKODE.

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 02/06/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K.HEMA, J.

M.F.A.NO.871 2000

Dated this the day of 2nd day of June, 2006

JUDGMENT

Appellant is a workman employed by the respondent, in the workshop. The appellant sustained employment injury on 8.3.1995 in an accident arising out of and in the course of employment. He was operating Welding Carbedo set and the tube burst out consequent to which he sustained burn injuries. He lost the pinna of left ear and he was disfigured. There was loss of hearing. The appellant claimed Rs.1,00,000/- as compensation for the permanent disablement sustained by him and filed a petition under Section 22 of the Workmen Compensation Act.

2. Appellant was examined as AW1 and marked Exhibits A1 to A6. The respondent remained ex-parte and no evidence was adduced. From the uncontroverted averments, it was found that the appellant was getting Rs.1,600/- as wages. He was employed by the respondent. He sustained an employment injury. He had 23% burns and 40% conductive deafness. Based on the evidence, the Commissioner assessed the loss of earning capacity of the appellant as 25%. He computed the compensation based on the formula in accordance with law and held that the appellant is entitled to compensation at Rs.28,153/- with interest.

3. Learned counsel for the appellant submitted that the appellant, who was aged only 19 years at the time of accident, suffered serious permanent disfigurement of his face and also loss of hearing due to the employment injury. Evidence given by AW1 on this aspect was not controverted. The respondent remained ex-parte and the version given by AW1 was not challenged. The appellant wanted to produce documents to establish that he had suffered permanent disability as spoken to by him in the evidence and as per his pleadings. But the Commissioner found that the appellant failed to produce disability certificate for assessing the loss of percentage of loss of earning capacity.

4. Learned counsel appearing for appellant requested that an opportunity may be given to the appellant to produce medical records to establish that the appellant suffered permanent disability as pleaded and as spoken to by him in his evidence which is not denied or controverted by the respondent. Only because the appellant could not produce the disability certificate his case may not be thrown over board, since the appellant was only 19 years at the time of sustaining the injury and he has lost all his prospects in the life due to the disfigurement and loss of hearing sustained by him in the prime of his youth. It was also submitted that he is prepared to undergo any medical examination by any Medical

Board as directed by the Commissioner to prove his case.

5. The respondent was ex-parte in this appeal also. Taking into consideration the facts stated above, especially the age of the appellant and the alleged nature of the disability allegedly sustained by him, I find that an opportunity has to be given to him for producing sufficient medical records to establish the nature of disablement caused to him by the injury. It is needless to say that it is only after finding that the appellant suffered permanent partial disability that the question of assessment of the extent of loss of earning capacity arises and it becomes relevant in the case of a non schedule injury as per Section 4(1)(c)(ii) of the Workmen Compensation Act.

6. The percentage of loss of earning capacity in the case of non schedule injury is to be assessed by a qualified medical practitioner. If there is no medical evidence to prove the percentage of loss of earning capacity assessed by a medical practitioner, the court can refer the applicant for this purpose as held in the decision reported in **New India Assurance Co.Ltd. v. Sreedharan** (1995(1) KLT 275(FB)). It will be, however, illegal to assess the loss of earning capacity by the Commissioner himself, in the absence of any medical evidence.

In the result, the order under challenge is set aside and the Commissioner is directed to reconsider the questions involved and dispose of the application in accordance with law, in the light of the observations made in the judgment, after affording a reasonable opportunity to the appellant to adduce such medical evidence as it may fit and proper. The appellant will appear before the Commissioner on 21.6.2006.

The appeal is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

M.F.A.NO.871 OF 2000

JUDGMENT

9.6.2006